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Federal Communications Commission

FCC 97-345

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Before the  
**FEDERAL COMMUNICATIONS COMMISSION**  
 Washington, D.C. 20554

In the Matter of	)	
	)	
Petition of MCI for Preemption	)	
Pursuant to Section 252(e)(5) of the	)	CC Docket No. 97-166
Telecommunications Act of 1996	)	

**MEMORANDUM OPINION AND ORDER**

Adopted: September 26, 1997

Released: September 26, 1997

By the Commission:

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## I. INTRODUCTION

1. This *Memorandum Opinion and Order* addresses the petition of MCI Telecommunications Corporation and MCImetro Access Transmission Services, Inc. (collectively, MCI) for preemption of the jurisdiction of the Missouri Public Service Commission (Missouri Commission) with respect to an arbitration proceeding involving MCI and Southwestern Bell Telephone Company (SWBT). Specifically, MCI seeks preemption of the Missouri Commission pursuant to section 252(e)(5) of the Communications Act of 1934,<sup>1</sup> as amended by the Telecommunications Act of 1996.<sup>2</sup> Section 252(e)(5) authorizes the Federal Communications Commission (Commission) to preempt a state commission in any proceeding or matter in which the state commission "fails to act to carry out its responsibility" under section 252.<sup>3</sup> Section 252 sets out the procedures by which telecommunications carriers may request and obtain interconnection, services or unbundled network elements from an incumbent local exchange carrier (LEC) either through voluntary negotiations or through mediation or arbitration by state commissions.<sup>4</sup> For the reasons discussed below, we find that MCI has not proven that the Missouri Commission "failed to act" within the meaning of section 252(e)(5), as required by our rules.<sup>5</sup> We therefore deny MCI's petition and do not preempt the Missouri Commission at this time.

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<sup>1</sup> 47 U.S.C. § 252(e)(5).

<sup>2</sup> Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (1996 Act), *codified at* 47 U.S.C. §§ 151 *et seq.* We will refer to the Communications Act of 1934, as amended, as "the Communications Act," or "the Act."

<sup>3</sup> 47 U.S.C. § 252(e)(5).

<sup>4</sup> *See generally* 47 U.S.C. § 252.

<sup>5</sup> *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, First Report and Order*, CC Docket No. 96-98, 11 FCC Rcd 15499, 16128 (1996), ¶ 1285 (*Local Competition Order*), *aff'd in part and vacated in part sub nom. Competitive Telecommunications Ass'n v. FCC*, 117 F.3d 1068 (8th Cir. 1997), *aff'd in part and vacated in part sub nom. Iowa Utils. Bd. v. FCC*, No. 96-3321 *et al.*, 1997 WL 403401 (8th Cir., July 18, 1997) (*Iowa Utils. Bd.*), *Order on Reconsideration*, 11 FCC Rcd 13042 (1996), *Second Order on Reconsideration*, 11 FCC Rcd 19738 (1996), *Third Order on Reconsideration and Further Notice of Proposed Rulemaking*, FCC 97-295 (rel. Aug. 18, 1997), *further recon. pending*; *see also* 47 C.F.R. § 51.803(b).

## II. BACKGROUND

### A. Statutory Provisions

2. Congress adopted sections 251 and 252 of the Act to foster local exchange competition by imposing certain requirements on incumbent LECs that are designed to facilitate the entry of competing providers. Section 251 describes the various requirements designed to promote market entry, including incumbent LECs' obligations to provide interconnection, services for resale and unbundled network elements.<sup>6</sup> Section 252 sets forth the procedures by which telecommunications carriers may request and obtain interconnection, unbundled network elements and services for resale from an incumbent LEC pursuant to section 251.<sup>7</sup> Specifically, section 252 establishes a scheme whereby telecommunications carriers may obtain interconnection with the incumbent according to agreements fashioned through (1) voluntary negotiations among the carriers, (2) mediation by state commissions, and (3) if necessary, arbitration by state commissions.<sup>8</sup> These interconnection agreements must then be submitted for approval to the appropriate state commission.<sup>9</sup>

3. Section 252(e)(5) directs this Commission to assume responsibility for any proceeding or matter in which the state commission "fails to act to carry out its responsibility" under section 252:

(5) COMMISSION TO ACT IF STATE WILL NOT ACT. -- If a State commission fails to act to carry out its responsibility under this section in any proceeding or other matter under this section, then the Commission shall issue an order preempting the State commission's jurisdiction of that proceeding or matter within 90 days after being notified (or taking notice) of such failure, and shall assume the responsibility of the State commission under this section with respect to the proceeding or matter and act for the State commission.<sup>10</sup>

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<sup>6</sup> See generally 47 U.S.C. § 251(c). For purposes of this order, the interconnection, access to unbundled network elements, services for resale and other items for which incumbent LECs have a duty to negotiate pursuant to section 251(c)(1) are sometimes referred to collectively as "interconnection."

<sup>7</sup> See generally 47 U.S.C. § 252.

<sup>8</sup> See 47 U.S.C. § 252(a), (b).

<sup>9</sup> 47 U.S.C. § 252(e)(1).

<sup>10</sup> 47 U.S.C. § 252(e)(5).

4. Section 252 sets forth several requirements that state commissions must follow in arbitrating disputes among incumbents and carriers requesting interconnection. Section 252(c) provides:

(c) STANDARDS FOR ARBITRATION. -- In resolving by arbitration under subsection (b) [of section 252] any open issues and imposing conditions upon parties to the agreement, a State commission shall --

- (1) ensure that such resolution and conditions meet the requirements of section 251, including the regulations prescribed by the [Federal Communications] Commission pursuant to section 251;
- (2) establish any rates for interconnection, services, or network elements . . . ; and
- (3) provide a schedule for implementation of the terms and conditions by the parties to the agreement.<sup>11</sup>

Further, section 252(b)(4)(A) requires a state commission to "limit its consideration of any [arbitration] petition . . . to the issues set forth in the petition and in the response, if any, filed [by the non-petitioning party to the negotiation]."<sup>12</sup>

5. In addition, section 252(b)(4)(C) requires a state commission to "resolve each issue set forth in the petition and the response, if any, by imposing appropriate conditions as required to implement subsection (c) [of section 252] upon the parties to the agreement, and [to] conclude the resolution of any unresolved issues not later than 9 months after the date on which the [incumbent] LEC received the request [for interconnection]."<sup>13</sup>

6. To assist the state commission in performing its arbitration duties, section 252(b)(2) delineates the roles of the parties to the arbitration. Section 252(b)(1) allows any party to an interconnection negotiation to petition the state commission for arbitration of "any open issues" during the 25-day period beginning on the 135th day after the incumbent

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<sup>11</sup> 47 U.S.C. § 252(c).

<sup>12</sup> 47 U.S.C. § 252(b)(4)(A).

<sup>13</sup> 47 U.S.C. § 252(b)(4)(C). Section 252 also sets forth requirements that a state commission must follow in reviewing an interconnection agreement or a "statement of generally available terms" submitted to the state commission for approval. 47 U.S.C. § 252(e)(1)-(e)(4); 47 U.S.C. § 252(f). Under section 252(f), a Bell Operating Company may demonstrate its compliance with the obligations of section 251 in certain circumstances by filing a statement of the terms and conditions that the company generally offers within a state with the state commission for approval. 47 U.S.C. § 252(f)(1).

received a request for interconnection and ending on the 160th day after such request.<sup>14</sup> Section 252(b)(2) directs the party petitioning for arbitration to comply with the following procedure:

(2) DUTY OF PETITIONER. --

(A) A party that petitions a State commission under paragraph (1) shall, at the same time as it submits the petition, provide the State commission all relevant documentation concerning --

- (i) the unresolved issues;
- (ii) the position of each of the parties with respect to those issues; and
- (iii) any other issue discussed and resolved by the parties.<sup>15</sup>

Section 252(b)(3) also permits the non-petitioning party to respond to the arbitration petition "and provide such additional information as it wishes within 25 days after the State commission receives the petition."<sup>16</sup> In addition, section 252(b)(4)(B) authorizes a state commission to require parties to an arbitration to submit needed information, but allows the state commission to resolve any open issues based on the best information available if the parties do not furnish such information quickly enough to assist the state commission in carrying out its arbitration responsibilities.<sup>17</sup>

**B. Commission's Regulations**

7. In our *Local Competition Order*, we established interim procedures to exercise our preemption authority under section 252(e)(5) in order to "provide for an efficient and fair transition from state jurisdiction should we have to assume the responsibility of the state commission . . ."<sup>18</sup> We concluded that we would not take an "expansive view" of what

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<sup>14</sup> 47 U.S.C. § 252(b)(1).

<sup>15</sup> 47 U.S.C. § 252(b)(2)(A).

<sup>16</sup> 47 U.S.C. § 252(b)(3).

<sup>17</sup> 47 U.S.C. § 252(b)(4)(B).

<sup>18</sup> *Local Competition Order*, 11 FCC Rcd at 16127, ¶ 1283. We adopted the procedures for exercising our section 252(e)(5) preemption authority on an interim basis in order to allow us "to learn from the initial experiences and gain a better understanding of what types of situations may arise that require Commission action." *Id.* at 16128, ¶ 1284.

constitutes a state commission's "failure to act" within the meaning of section 252(e)(5).<sup>19</sup> Rather, we interpreted "failure to act" to mean a state's failure to complete its duties in a timely manner, thereby limiting preemption under section 252(e)(5) "to instances where a state commission fails to respond, within a reasonable time, to a request for mediation or arbitration, or fails to complete arbitration within the time limits of section 252(b)(4)(C)."<sup>20</sup> We also concluded that "[t]he party seeking preemption [pursuant to section 252(e)(5)] must prove that the state [commission] has failed to act to carry out its responsibilities under section 252 of the Act."<sup>21</sup> Further, we concluded that once we assume jurisdiction of a matter pursuant to section 252(e)(5), "any and all further action regarding that proceeding or matter will be before the Commission," rather than before the state commission that has failed to act.<sup>22</sup> In its review of the *Local Competition Order*, the U.S. Court of Appeals for the Eighth Circuit acknowledged that we have authority, pursuant to section 252(e)(5), to preempt a state commission's jurisdiction if it fails to fulfill its duties under section 252 of the Act.<sup>23</sup>

### C. Procedural History

8. On March 26, 1996, MCI sent a letter to SWBT requesting interconnection in all five states of SWBT's region, including Missouri.<sup>24</sup> The parties subsequently attempted to negotiate the terms of a preliminary nondisclosure agreement, which would govern the treatment of information exchanged during negotiations over an interconnection agreement.<sup>25</sup> Three months later, after these negotiations proved unsuccessful, SWBT sent a letter to the Missouri Commission asking it to mediate the dispute regarding the nondisclosure

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<sup>19</sup> *Id.* at 16128, ¶ 1285.

<sup>20</sup> *Local Competition Order*, 11 FCC Rcd at 16128, ¶ 1285; *see also* 47 C.F.R. § 51.801(b). Such instances would not encompass those in which an interconnection agreement is "deemed approved" under section 252(e)(4) as a result of state commission inaction. *Local Competition Order*, 11 FCC Rcd at 16128, ¶ 1285; *see also* 47 C.F.R. § 51.801(c).

<sup>21</sup> *Local Competition Order*, 11 FCC Rcd at 16128, ¶ 1285; *see also* 47 C.F.R. § 51.803(b).

<sup>22</sup> *Local Competition Order*, 11 FCC Rcd at 16129, ¶ 1289; *see also* 47 C.F.R. § 51.805(a).

<sup>23</sup> *Iowa Utils. Bd.*, 1997 WL at 403401, at \*14.

<sup>24</sup> MCI Petition at 6; SWBT Response at 2. The other states in SWBT's region are Texas, Kansas, Arkansas and Oklahoma.

<sup>25</sup> MCI Petition at 6; SWBT Response at 2.

agreement.<sup>26</sup> The Missouri Commission met with both parties regarding the terms of the nondisclosure agreement on July 10, 1996, but that meeting also proved unsuccessful.<sup>27</sup> Thereafter, on August 16, 1996, MCI filed with the Missouri Commission a petition for arbitration pursuant to section 252(b) of the Act ("the August 16, 1996 Arbitration Petition").<sup>28</sup>

9. MCI's petition sought arbitration of several issues involving pricing, as well as technical and other standards for interconnection.<sup>29</sup> The petition described the issues very generally. After the general description of each issue, MCI included a brief description of its position on that issue.<sup>30</sup> Except with respect to the nondisclosure agreement, MCI did not include SWBT's position on any of the issues. Rather, MCI stated: "As a result of [SWBT's] insistence on a restrictive non-disclosure agreement, MCI has not been able to determine [SWBT's] position on the issues."<sup>31</sup> The petition was accompanied by "MCI's Requirements for Intercarrier Agreements," a lengthy document detailing proposed technical requirements for interconnection. This document appears to describe MCI's preferred requirements for interconnection with any incumbent LEC.<sup>32</sup> MCI requested arbitration of all of the issues in the petition and the "Requirements for Intercarrier Agreements" and asked that SWBT be ordered to respond to the petition by identifying "each and every point of contention."<sup>33</sup>

10. On September 17, 1996, the Missouri Commission granted a request by MCI and AT&T, which also had requested interconnection with SWBT, to consolidate their

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<sup>26</sup> SWBT Response at 2.

<sup>27</sup> *Id.* at 3.

<sup>28</sup> MCI Petition at 6; Missouri Commission Response at 2.

<sup>29</sup> These issues included: interconnection; access to unbundled network elements; access to poles, ducts, conduits and rights of way; access to 911 services, directory assistance and operator services; customer access to directory listings; access to telephone numbers; access to signaling systems; number portability; dialing parity; reciprocal compensation; resale; collocation; nondisclosure agreements; and other operational matters. MCI Petition, Affidavit of Stephen F. Morris, Exhibit B at 9-11.

<sup>30</sup> *See, e.g. id.* (describing MCI's position on the interconnection issue).

<sup>31</sup> *See id.* at 14.

<sup>32</sup> *See generally id.*

<sup>33</sup> *Id.* at 38.

respective arbitration requests ("the Consolidation Order").<sup>34</sup> The Consolidation Order also required MCI, AT&T, SWBT and the Missouri Office of the Public Counsel jointly to file an issues memorandum ("the Joint Issues Memorandum" or "the Memorandum") that "shall clearly set out the position of each party on every contested issue" by early October, 1996.<sup>35</sup> The Joint Issues Memorandum was filed on October 4, 1996, and listed 41 unresolved issues and the parties' positions on these issues. The final item of the Memorandum ("Item 42") was a "catch-all" category in which each of the parties recommended how all other terms of interconnection, beyond those encompassed by the first 41 issues, should be decided.<sup>36</sup> In response to Item 42,<sup>37</sup> SWBT recommended that the Missouri Commission decide the initial 41 issues identified in the Memorandum and allow the parties to continue negotiating any remaining terms. MCI and AT&T, however, recommended, in essence, that the Missouri Commission adopt the terms and conditions of their respective proposed interconnection agreements.<sup>38</sup> Less than a week after the Memorandum was filed, the Missouri Commission commenced on October 8, 1996 formal hearings before an administrative law judge during which witnesses presented testimony and exhibits concerning the issues in the Memorandum and were subject to cross-examination.<sup>39</sup> The hearings were concluded on October 17, 1996.

11. On December 11, 1996, nine months after SWBT received MCI's formal request for interconnection, the Missouri Commission issued an arbitration order ("the December 11, 1996 Arbitration Order").<sup>40</sup> The December 11, 1996 Arbitration Order resolved the first 41 issues in the Joint Issues Memorandum. Among other things, the Order set interim rates for various services and network elements pending the development of

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<sup>34</sup> SWBT Response at 3; Missouri Commission Response at 2.

<sup>35</sup> SWBT Response at 3; Missouri Commission Response at 3.

<sup>36</sup> Joint Issues Memorandum at 57-58 (submitted as an attachment to SWBT Response, Affidavit of James R. Oxler). Specifically, Item 42 poses the question: "What should be the other terms of interconnection?" Joint Issues Memorandum at 57. The Memorandum then includes a description of how each party would answer that question. *Id.*

<sup>37</sup> *See supra* note 36.

<sup>38</sup> Joint Issues Memorandum at 57-58. The Joint Issues Memorandum indicates that MCI filed an actual proposed agreement, whereas AT&T merely recommended that the Missouri Commission direct AT&T to submit a proposed agreement. *Id.*

<sup>39</sup> Missouri Commission Response at 3; MCI Petition at 7; SWBT Response at 4; Joint Issues Memorandum at 60.

<sup>40</sup> Missouri Commission Response at 3; MCI Petition at 7; SWBT Response at 5.

permanent rates.<sup>41</sup> With respect to Item 42, the Order states:

Any negotiated outcome inevitably rests on the good will and commitment of the negotiating parties. The record reflects that MCI and SWBT were not able to agree to a pre-negotiation non-disclosure agreement. The failure of the parties to negotiate in good faith has brought the arbitration of virtually every detail to the Commission's doorstep. The Commission has dedicated the necessary staff resources to hearing and resolving these issues and hereby encourages the parties to complete the process by negotiating their final agreements in compliance with this Arbitration Order. The Commission finds no other terms are necessary to complete this arbitration.<sup>42</sup>

The Order did not set a deadline at that time for the parties to file a completed interconnection agreement incorporating the findings of the December 11, 1996 Arbitration Order or resolving the issues encompassed by Item 42.<sup>43</sup> Following the issuance of the December 11, 1996 Arbitration Order, MCI, AT&T and SWBT filed a series of motions and responses for modification or clarification of the Order.<sup>44</sup>

12. In response to several motions by the parties, on January 22, 1997, the Missouri Commission issued an order modifying and clarifying aspects of the December 11, 1996 Arbitration Order ("the January 22, 1997 Clarification Order") in which it set a deadline of June 30, 1997, for the Missouri Commission to set permanent rates for resale and unbundled network elements that would replace the interim rates established in the December 11, 1996 Arbitration Order.<sup>45</sup> In order to perform the detailed analysis it considered necessary for establishing permanent rates, the Missouri Commission directed its staff to conduct an investigation regarding appropriate critical inputs and costing models.<sup>46</sup>

13. While the Missouri Commission conducted its investigation to set permanent

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<sup>41</sup> December 11, 1996 Arbitration Order at 48 (submitted as Exhibit F of MCI Petition, Affidavit of Stephen F. Morris).

<sup>42</sup> *Id.* at 47-48.

<sup>43</sup> MCI Petition at 14.

<sup>44</sup> Missouri Commission Response at 4-5; SWBT Response at 5-6.

<sup>45</sup> Missouri Commission Response at 5; MCI Petition at 16; SWBT Response at 5.

<sup>46</sup> Missouri Commission Response at 5.

rates, the parties attempted, again unsuccessfully, to negotiate a completed interconnection agreement consistent with the December 11, 1996 Arbitration Order.<sup>47</sup> During this period, MCI asked the Missouri Commission on several occasions to set a deadline for completion of an interconnection agreement, but the Missouri Commission did not do so.<sup>48</sup> On June 16, 1997, after several months of negotiations, MCI filed with the Missouri Commission a proposed interconnection agreement ("the June 16, 1997 Proposed Agreement") which, in MCI's view, incorporated the terms of the December 11, 1996 Arbitration Order.<sup>49</sup> When MCI then moved for Missouri Commission approval of the June 16, 1997 Proposed Agreement, SWBT moved to strike the agreement.<sup>50</sup> SWBT stated in its motion to strike that MCI "failed to identify" the issues in its June 16, 1997 Proposed Agreement in the Joint Issues Memorandum "as required by the [Missouri] Commission, instead limiting its description of the issues to a request that its contract be adopted in toto. The [Missouri] Commission rejected that approach . . ."<sup>51</sup>

14. On July 18, 1997, MCI filed the instant preemption petition with the Commission. Responses to MCI's preemption petition were submitted by SWBT and the Missouri Commission on August 4, 1997. Between the filing of the preemption petition and the responses, the Missouri Commission staff investigating permanent rates compiled a report which the Missouri Commission incorporated into a "final" arbitration order released on July 31, 1997 ("the July 31, 1997 Arbitration Order").<sup>52</sup> The July 31, 1997 Arbitration Order declined to adopt MCI's June 16, 1997 Proposed Agreement and directed the parties to submit an interconnection agreement reflecting the findings of the July 31, 1997 Arbitration Order by

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<sup>47</sup> MCI Petition at 14; SWBT Response at 6.

<sup>48</sup> MCI Petition at 15.

<sup>49</sup> Missouri Commission Response at 6; MCI Petition at 15; SWBT Response at 6.

<sup>50</sup> SWBT Response at 7.

<sup>51</sup> *Petition of MCI Telecommunications Corporation and its Affiliates, Including MCImetro Access Transmission Services, Inc. for Arbitration and Mediation Under the Federal Telecommunications Act of 1996 of Unresolved Interconnection Issues with Southwestern Bell Telephone Company*, Response of Southwestern Bell Telephone Company to MCI's Reply, Missouri Commission Case No. TO-97-67, filed July 28, 1997, at 1 (submitted as an attachment to SWBT Response, Affidavit of James R. Oxler); *see also* SWBT Response at 7 ("[I]t is not appropriate to resolve these additional matters outside of the arbitration process.") (quoting from SWBT's motion to strike).

<sup>52</sup> Missouri Commission Response at 6-7; SWBT Response at 7.

September 30, 1997.<sup>53</sup>

**D. MCI's Preemption Petition**

15. MCI requests that the Commission preempt the jurisdiction of the Missouri Public Service Commission (Missouri Commission) with respect to the arbitration proceeding at issue here because MCI contends that the Missouri Commission "failed to act" within the meaning of section 252(e)(5) of the Act.<sup>54</sup> In particular, MCI submits that the Missouri Commission did not resolve a number of critical issues within the prescribed nine month period and thus, in MCI's view, the Missouri Commission failed to satisfy that subsection by not "produc[ing] a functioning interconnection agreement in a timely manner."<sup>55</sup> In addition, MCI claims that the Missouri Commission left unresolved several terms and conditions that, according to MCI, must be decided before the issues that the Missouri Commission did, in fact, decide can be implemented.<sup>56</sup> MCI further submits that the Missouri Commission did not resolve these critical issues and terms even though the Missouri Commission recognized that MCI's petition sought "'arbitration of virtually every detail'" of interconnection.<sup>57</sup> In particular, MCI asserts that it specifically requested arbitration on issues encompassed by its "Requirements for Intercarrier Agreements" submitted with the August, 1996 petition, which reflected only MCI's positions, because negotiations with SWBT did not result in agreement on any substantive issues.<sup>58</sup>

16. Rather than arbitrate all of the issues in its arbitration petition and

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<sup>53</sup> Missouri Commission Response at 6; SWBT Response at 7.

<sup>54</sup> MCI Petition at 15.

<sup>55</sup> *Id.* In its preemption petition and *ex parte* filings with the Commission, MCI identifies the issues that it believes are encompassed by Item 42. The issues that MCI claims the Missouri Commission never reached include: the appropriate scope of any agreement reached between MCI and SWBT; the effect of such an agreement on subsequent regulatory action; the term of such an agreement; the effect of such an agreement on subsequent alterations in the Missouri Commission's rules or other legal requirements; intellectual property rights; indemnifications and limitations on liability; warranties regarding quality of service and nondiscriminatory access; remedies for breach of contract; and dispute resolution procedures. *Id.*

<sup>56</sup> *Id.* at 8. According to MCI, these unresolved terms include the conditions and pricing for: interconnection, resale, unbundled network elements, collocation, access to rights of way, number portability and operational support systems, among other issues. *Id.* at 8-13. See *supra* note 55.

<sup>57</sup> MCI Petition at 7 (quoting December 11, 1996 Order, at 47).

<sup>58</sup> MCI Petition at 6.

"Requirements for Inter-carrier Agreements," MCI asserts, the Missouri Commission encouraged MCI and SWBT to return to private negotiations over the unresolved issues.<sup>59</sup> According to MCI, these private negotiations were unsuccessful, in part, because of SWBT's dilatory tactics and because the Missouri Commission declined to set a deadline for MCI and SWBT to submit a complete interconnection agreement, despite MCI's request that the Missouri Commission do so.<sup>60</sup> MCI claims that it submitted the June 16, 1997 Proposed Agreement after determining that further negotiation with SWBT regarding the issues left unresolved by the December 11, 1996 Order would be futile.<sup>61</sup> MCI's preemption petition contends that the Missouri Commission has taken no action on this proposed agreement.<sup>62</sup>

17. MCI bases its claim for preemption under section 252(e)(5) on its interpretation of sections 251 and 252 of the Act. Specifically, MCI points out that the Commission, in the *Local Competition Order*, concluded that, under section 252(e)(5), a state commission "fails to act" if the state commission fails to complete its duties under section 252 in a timely manner.<sup>63</sup> MCI asserts that, as part of these duties, a state commission must (1) resolve any open issues that the parties to an arbitration proceeding could not successfully negotiate; and (2) impose any conditions necessary to implement the provisions of section 252(c), which requires that all issues resolved and conditions imposed by the state commission meet the requirements of section 251 and any relevant FCC regulations.<sup>64</sup> Because section 251, in turn, imposes requirements on incumbent LECs regarding the terms and conditions of interconnection,<sup>65</sup> MCI argues that "a state commission's responsibility under section 252 plainly extends to resolving disputes over the specific terms and conditions of interconnection,

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<sup>59</sup> *Id.* at 7.

<sup>60</sup> *Id.* at 14.

<sup>61</sup> *Id.*

<sup>62</sup> *Id.* at 15.

<sup>63</sup> *Id.* at 6.

<sup>64</sup> *Id.* at 3-4 (citing section 252(b)(4)(C)).

<sup>65</sup> In particular, MCI writes: "Section 251 . . . requires 'just and reasonable' terms and conditions for all aspects of interconnection and leasing unbundled elements . . .; mandates access 'that is at least equal in quality to that provided by the [incumbent] to itself, or to any subsidiary, affiliate, or any other party to which the carrier provides interconnection . . .; and encompasses a range of other requirements designed to make local competition possible." MCI Petition at 4 (quoting § 251(c)) (citations omitted).

access to unbundled elements, and resale."<sup>66</sup> MCI submits that this argument is consistent with the *Local Competition Order*, which, according to MCI, contemplated that state commissions conducting arbitrations under section 252 would have to define specific terms and conditions governing access to unbundled elements, interconnection and resale of services.<sup>67</sup> Thus, reading sections 251 and 252 together, MCI concludes that state commissions have a duty to resolve all issues necessary "to produce actual working interconnection agreements" within the nine month time frame referred to in section 252(b)(4)(C).<sup>68</sup>

**E. Response of the Missouri Public Service Commission**

18. The Missouri Commission argues that there is no basis for the relief MCI requests because the Missouri Commission issued its "final arbitration order" on July 31, 1997, nearly two weeks after MCI filed its petition for preemption.<sup>69</sup> The July 31, 1997 Arbitration Order requires that MCI and SWBT prepare and submit an interconnection agreement incorporating the pricing and other requirements of the July 31, 1997 Arbitration Order no later than September 30, 1997.<sup>70</sup> The Missouri Commission argues that MCI's preemption petition "is a backdoor attempt by MCI to expand the list of issues [to be arbitrated] to include those that it failed to properly bring before the [Missouri Commission] prior to the hearings [on MCI's arbitration petition] in October 1996."<sup>71</sup>

19. The Missouri Commission argues that MCI failed to satisfy its obligation, pursuant to the Missouri Commission's September 17, 1996 Consolidation Order, to present all issues for arbitration clearly in the Joint Issues Memorandum.<sup>72</sup> The Missouri Commission asserts that the unresolved issues upon which MCI bases its preemption petition were never

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<sup>66</sup> MCI Petition at 4.

<sup>67</sup> *Id.* at 4.

<sup>68</sup> *Id.* at 4-5. In an *ex parte* filing dated September 3, 1997, MCI reiterates its view that the parties will not be able to complete an interconnection agreement if the Missouri Commission does not resolve all open issues, which MCI maintains were presented in its petition and subsequent filings. *See id.*

<sup>69</sup> Missouri Commission Response at 1.

<sup>70</sup> *Id.*

<sup>71</sup> *Id.* at 3.

<sup>72</sup> *Id.* at 6.

properly before the Missouri Commission and thus the Missouri Commission did not fail to carry out its responsibilities by not resolving these issues.<sup>73</sup> Further, the Missouri Commission argues that MCI misread its direction, in the December 11, 1996 Order, that MCI and SWBT negotiate a final agreement in compliance with that order. According to the Missouri Commission, MCI erroneously interpreted this directive as an instruction that the parties resolve any remaining issues solely through private negotiations.<sup>74</sup> According to the Missouri Commission, the December 11, 1996 Order "was simply indicating that [the Missouri Commission] expected MCI and SWBT to use the findings and conclusions included in the [December 11, 1996 Order] to complete the process of preparing an Interconnection Agreement for [approval by the Missouri Commission] that contained the provisions that were detailed in the December 11, 1996 Order."<sup>75</sup>

20. In addition, the Missouri Commission contests MCI's assertion that the Missouri Commission has taken no action on MCI's June 16, 1997 Proposed Agreement. The Missouri Commission interpreted the June 16, 1997 Proposed Agreement as a request by MCI for further arbitration concerning issues that were not presented among the first 41 issues in the Joint Issues Memorandum.<sup>76</sup> The Missouri Commission states that, in the weeks after that proposed agreement was filed, the Missouri Commission's staff analyzed data and compiled the report which was incorporated into the July 31, 1997 Arbitration Order, and the Missouri Commission itself discussed the matter on several occasions.<sup>77</sup> Further, the Missouri Commission submits that MCI's June 16, 1997 Proposed Agreement was substantially different from the proposed agreement MCI filed with the Joint Issues Memorandum.<sup>78</sup> Consequently, the Missouri Commission asks that MCI not be permitted to "hide behind its own failure to request determinations from the [Missouri Commission] by requesting that the FCC exercise its [preemption] authority under Section 252(e)(5)."<sup>79</sup>

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<sup>73</sup> *Id.* at 4.

<sup>74</sup> *Id.*

<sup>75</sup> *Id.*

<sup>76</sup> *Id.* at 6-7.

<sup>77</sup> *Id.*

<sup>78</sup> *Id.* at 7.

<sup>79</sup> *Id.* at 6.

**F. Response of Southwestern Bell**

21. SWBT rejects MCI's contention that the Missouri Commission "failed to act" within the meaning of section 252(e)(5) because, in SWBT's view, the Missouri Commission responded within a reasonable time both to SWBT's July 1996 request for mediation regarding the nondisclosure agreements and to MCI's October 1996 petition for arbitration.<sup>80</sup> SWBT, like MCI, argues that the Missouri Commission's December 11, 1996 Order instructed the parties to resolve any issues not resolved in that order through private negotiations.<sup>81</sup> SWBT, however, asserts that MCI has failed to negotiate diligently regarding interconnection, primarily because MCI's negotiators initially focused their attention on other states in SWBT's region.<sup>82</sup> Further, SWBT asserts that MCI failed to fulfill its duty, as the party petitioning for arbitration, to raise all contested issues and the parties' positions on these issues clearly in the arbitration petition.<sup>83</sup> In particular, SWBT contends that MCI failed to fulfill this duty with respect to any issues or positions that the Missouri Commission would have had to extract from MCI's "Requirements for Intercarrier Agreements" or MCI's proposed agreements.<sup>84</sup> SWBT contends that the Missouri Commission was not required to analyze MCI's "Requirements" or its proposed agreements to "identify every conceivable issue within, and . . . try to resolve every issue without even knowing SWBT's position."<sup>85</sup> SWBT argues, in essence, that the only issues MCI clearly presented to the Missouri Commission were the first 41 issues specified in the Joint Issues Memorandum. In addition, SWBT points to the amount of time and effort the Missouri Commission's staff spent between February 7, 1997, and July 31, 1997, to establish permanent rates as further support for its view that the Missouri Commission did not fail to meet its responsibilities under section 252.<sup>86</sup> SWBT takes the position that if current negotiations and the Missouri Commission's September 30, 1997 deadline for filing a complete agreement do not yield such an agreement, MCI can seek

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<sup>80</sup> SWBT Response at 8.

<sup>81</sup> *Id.* at 11-12.

<sup>82</sup> *Id.* As stated above, MCI requested interconnection in all five of SWBT's states simultaneously. *See supra* ¶ 8.

<sup>83</sup> SWBT Response at 9.

<sup>84</sup> *Id.* at 10.

<sup>85</sup> *Id.* at 13. Like the Missouri Commission, SWBT indicates that MCI's June 16, 1997 Proposed Agreement differed substantially from the proposed agreement MCI submitted with the Joint Issues Memorandum. *Id.* at 11.

<sup>86</sup> *Id.* at 13.

further arbitration of any remaining issues.<sup>87</sup>

22. SWBT relies on our conclusion in the *Local Competition Order* that the Commission will "exercise its preemption authority under section 252(e)(5) only 'where a state commission fails to respond, within a reasonable time, to a request for mediation or arbitration, or fails to complete arbitration within the time limits of section 252(b)(4)(C).'"<sup>88</sup> SWBT contends that, under section 252(b)(4)(C), whether the Missouri Commission failed to carry out its section 252 responsibilities turns on whether the Missouri Commission "resolve[d] each issue set forth in the petition and the response . . . [and] conclude[d] the resolution of any unresolved issues not later than 9 months after the date on which the LEC received the [interconnection] request . . ."<sup>89</sup> SWBT submits that there is no dispute that the Missouri Commission (1) responded within a reasonable time to SWBT's July 1996 request for mediation and (2) resolved the first 41 issues raised in the October, 1996, Joint Issues Memorandum within nine months of MCI's request for interconnection with SWBT.<sup>90</sup>

23. SWBT argues that MCI failed to satisfy its duty to present any open issues, as well as the parties' positions on these issues, in its arbitration petition "in such a way that the State commission is able to consider and resolve [the issues]."<sup>91</sup> This duty, SWBT argues, arises from section 252(b)(2)(A), which sets out the responsibilities of parties petitioning for arbitration, and from the Consolidation Order, which required the parties to set out clearly the position of each party on every contested issue.<sup>92</sup> Moreover, SWBT contends that even if it were not "unreasonable" for the Missouri Commission to review the lengthy proposed agreements submitted in support of the arbitrations to identify unresolved issues and the parties' positions on these issues, the Missouri Commission would have lacked authority to do so because section 252(b)(4)(A) states that "[t]he State commission shall limit its consideration of any petition . . . to the issues set forth in the petition and in the response . . ."<sup>93</sup> In SWBT's view, any issues contained in MCI's proposed agreements or "Requirements

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<sup>87</sup> *Id.* at 6, 13-14

<sup>88</sup> *Id.* at 8 (quoting *Local Competition Order*, 11 FCC Rcd at 16128, ¶ 1285).

<sup>89</sup> SWBT Response at 8 (quoting 47 U.S.C. § 252(b)(4)(C)).

<sup>90</sup> SWBT Response at 8, 10.

<sup>91</sup> *Id.* at 9.

<sup>92</sup> *Id.* at 10.

<sup>93</sup> *Id.* at 9.

for Inter-carrier Agreements" were not "set forth in the petition or the response" within the meaning of section 252(b)(4)(A).

### III. DISCUSSION

#### A. Scope of the Commission's Preemption Authority Under Section 252(e)(5)

24. The plain language of the Act provides that we have authority, pursuant to section 252(e)(5), to preempt the jurisdiction of a state commission in arbitrations and any other matters in which the state commission has failed to carry out its responsibilities under section 252:

"If a State commission fails to act to carry out its responsibility under [section 252] . . . the Commission shall issue an order preempting the State commission's jurisdiction."<sup>94</sup>

None of the parties contests section 252(e)(5)'s clear grant of authority to the Commission. Further, we find nothing in the Act or any other controlling authority that would define or otherwise limit our power to preempt state commissions that "fail to act" pursuant to section 252(e)(5). This conclusion is consistent with the Eighth Circuit's *Iowa Utilities Board* decision, which recognized the Commission's authority to preempt under Section 252(e)(5) if a state commission fails to fulfill its duties under section 252 of the Act.<sup>95</sup>

25. Accordingly, we look to the plain language of the Act to determine the scope of our preemption authority under section 252(e)(5). That section provides that the Commission shall preempt a state commission that fails to act "in any proceeding or other matter under this section."<sup>96</sup> Thus, the unambiguous text of section 252(e)(5) indicates that we have authority to preempt a state commission's jurisdiction in any proceeding that a state conducts pursuant to section 252.<sup>97</sup> In the following paragraphs, we will focus on the state

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<sup>94</sup> 47 U.S.C. § 252(e)(5).

<sup>95</sup> *Iowa Utils. Bd.*, 1997 WL at 403401, at \*14.

<sup>96</sup> 47 U.S.C. § 252(e)(5).

<sup>97</sup> We emphasize, however, that the Act does not authorize us to find that a state commission has failed to act within the meaning of section 252(e)(5) merely because the state commission allows an agreement submitted for approval under section 252(e)(1) to go into effect automatically by declining to reject the agreement within the 30-day time frame established in section 252(e)(4). See 47 U.S.C. § 252(e)(4).

commissions' responsibility to arbitrate interconnection issues, as it is this responsibility upon which MCI relies in seeking preemption under 252(e)(5).

26. Pursuant to our preemption jurisdiction under section 252(e)(5), we have authority to interpret what it means for a state commission to "fail to act" under this section.<sup>98</sup> As stated above, we concluded in the *Local Competition Order* that we would not take an "expansive view" of what constitutes a state commission's "failure to act" within the meaning of section 252(e)(5).<sup>99</sup> Nevertheless, to give effect to our clear grant of preemption authority under that section, we conclude that we must examine more specifically the responsibilities Congress gave the states, in the first instance, to perform pursuant to section 252. For this examination, we return to the language of the Act.

27. Section 252(b)(4)(A) requires a state commission conducting an arbitration to "limit its consideration . . . to the issues set forth in the petition and in the response, if any, filed [by the non-petitioning party to the arbitration]."<sup>100</sup> We interpret this provision to mean that, in cases involving arbitration proceedings, a state commission may not be found to have "failed to act" within the meaning of section 252(e)(5) if the issue or issues that are the subject of the preemption petition were never clearly and specifically presented to the state commission in accordance with any procedures set forth by the state commission. In our view, it would be inconsistent with the Act's grant of authority to the state commissions to arbitrate disputes if we interpreted the statute to authorize us to preempt the state commissions for "failing" to arbitrate disputes that were not clearly and specifically presented to the state commission in the first instance for arbitration.

28. We emphasize that, because we may not find that state commissions have "failed to act" within the meaning of section 252(e)(5) solely because they have not arbitrated issues that were never clearly presented to them, it is critical that parties petitioning for

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<sup>98</sup> The legislative history of this section provides little guidance regarding the meaning of the phrase "fails to act." The conference committee report, in discussing section 252(e)(5) and other provisions of section 252, tends merely to track the language in the statute itself. For example, the "conference agreement" portion of the discussion of section 252 in the Joint Explanatory Statement states that section 252(e) "provides Commission authority to act if a State does not" and that "[t]he House recedes to the Senate on section 252(e)." Joint Managers' Statement, S. Conf. Rep. No. 104-230, 104th Cong., 2d Sess. 11-12 (1996) (Joint Explanatory Statement). The "Senate bill" portion of the discussion of section 252, in turn, indicates that the Senate bill, if enacted, would have provided that "if a State fails to carry out its [arbitration] responsibilities . . . the Commission shall assume the responsibilities of the State in the applicable proceeding or matter." *Id.* at 11-12.

<sup>99</sup> See *supra* ¶ 7.

<sup>100</sup> 47 U.S.C. § 252(b)(4)(A).

arbitration present *all* unresolved issues that they wish arbitrated (rather than a subset of such issues) to the state commission as expeditiously and specifically as possible. Section 252(b)(2) makes clear that a party petitioning for arbitration must "at the same time as it submits the petition, provide the State commission all relevant documentation concerning . . . the unresolved issues; [and] . . . the position of each of the parties with respect to those issues."<sup>101</sup> According to section 252(b)(3), the non-petitioning party *may*, but is not required to, respond to the arbitration petition.<sup>102</sup> Thus, a petitioner for arbitration may not rely on the non-petitioning party to raise, in its response to the petition, any unresolved issues or to present the non-petitioning party's positions on such issues, as such a response may never be filed.

29. We believe that the language of section 252 suggests that Congress intended that the process of negotiating and, when necessary, arbitrating interconnection agreements would have some definite end. Specifically, section 252(b)(4)(C) requires state commissions to resolve any open issues set forth in an arbitration petition and response within nine months after the date on which the incumbent LEC received the request for interconnection.<sup>103</sup> Further, section 252(c)(3) requires a state commission that is conducting an arbitration to provide a schedule for implementation of the terms and conditions derived through arbitration by the parties to the arbitration.<sup>104</sup> We interpret these provisions as requiring state commissions, at the very least, to ensure that they do not forestall the completion of interconnection negotiations by failing to resolve all the issues clearly presented to them in a timely manner.<sup>105</sup>

30. We also remind carriers that they have an ongoing duty, pursuant to section 251(c)(1), to negotiate the terms and conditions of interconnection in good faith.<sup>106</sup> We strongly encourage state commissions, in addition to satisfying their mediation and arbitration responsibilities under section 252, to enforce vigorously all carriers' duty to negotiate in good faith. We find that only by fulfilling both of these responsibilities will state commissions provide new entrants with the best opportunity to reach complete and workable

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<sup>101</sup> 47 U.S.C. § 252(b)(2)(A).

<sup>102</sup> 47 U.S.C. § 252(b)(3).

<sup>103</sup> 47 U.S.C. § 252(b)(4)(C).

<sup>104</sup> 47 U.S.C. § 252(c)(3).

<sup>105</sup> 47 U.S.C. § 252(b)(4)(C); *see also* 47 C.F.R. § 51.801(b).

<sup>106</sup> 47 U.S.C. § 251(c)(1).

interconnection agreements with incumbent carriers.

**B. The Missouri Arbitration**

31. We find that MCI has not proven that the Missouri Commission "failed to act to carry out its responsibilities under section 252 of the Act," as required by our rules,<sup>107</sup> and thus we deny MCI's petition for preemption. In particular, on the record before us, we find that the Missouri Commission resolved in a timely manner all of the issues that were clearly and specifically presented to it. We thus conclude, on these facts, that the Missouri Commission's conduct did not amount to a "failure to act" within the meaning of section 252(e)(5).

32. We reject the Missouri Commission's argument that we may not preempt pursuant to section 252(e)(5) simply because the Missouri Commission issued its July 31, 1997 Arbitration Order. That order, issued nearly two weeks after MCI filed its July 18, 1997 preemption petition with this Commission, established permanent rates for unbundled network elements and services for resale and set a deadline for the parties to submit a final interconnection agreement.<sup>108</sup> Although MCI claims that the Missouri Commission, in its earlier December 11, 1996 Arbitration Order, should have set a deadline for the parties to submit a completed interconnection agreement,<sup>109</sup> its preemption petition is based on its view that the Missouri Commission failed to arbitrate "numerous issues which are essential to forging a valid, binding contract."<sup>110</sup> These issues extend well beyond pricing.<sup>111</sup> Consequently, we find that MCI's petition is not rendered moot by the Missouri Commission's July 31, 1997 Arbitration Order.

33. MCI's case for preemption consists essentially of two arguments. First, MCI argues that the Missouri Commission "failed to act" within the meaning of section 252(e)(5) because it did not, in MCI's view, carry out all of the tasks that the Act assigns to state commissions conducting arbitrations. Second, MCI makes a related argument that the Missouri Commission "failed to act" because it did not carry out its required arbitration tasks within the nine-month time frame that the Act specifies under section 252(b)(4)(C).

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<sup>107</sup> *Local Competition Order*, 11 FCC Rcd at 16128, ¶ 1285; *see also* 47 C.F.R. § 51.803(b).

<sup>108</sup> Missouri Commission Response at 3-5.

<sup>109</sup> MCI Petition at 15-16.

<sup>110</sup> *Id.* at 7.

<sup>111</sup> *Id.* at 7-8. *See supra* ¶ 15.

34. With respect to the first argument, we find no basis for concluding that the Missouri Commission, to date, has failed to carry out all of its arbitration responsibilities under section 252. As stated above, MCI's August, 1996 arbitration petition only generally described the unresolved issues.<sup>112</sup> Subsequently, the Missouri Commission requested that the parties file a Joint Issues Memorandum that clearly set out the position of each party "on every contested issue."<sup>113</sup> The Missouri Commission thus specified how it wanted the parties to present the unresolved issues to it for arbitration. As noted above, the parties filed the Joint Issues Memorandum on October 4, 1996, as requested. The first 41 issues listed in the Joint Issues Memorandum clearly specified each unresolved issue and the parties' positions on those issues, as required by the Missouri Commission. In contrast, MCI failed to identify clearly or specifically any of the issues encompassed by Item 42 of the Joint Issues Memorandum, even though it was directly requested by the Missouri Commission to do so.<sup>114</sup> Rather, for purposes of Item 42, MCI merely asked the Missouri Commission to "adopt the other terms and conditions expressed in MCI's proposed Interconnection Agreement."<sup>115</sup> Similarly, in submitting the June 16, 1997 Proposed Agreement, MCI asked the Missouri Commission, in essence, to comb through that agreement, identify the unresolved issues, and then adopt MCI's positions on those issues. We thus agree with the Missouri Commission and SWBT that, with the exception of the first 41 issues listed in the Joint Issues Memorandum, MCI's various submissions fell short of satisfying its duty, under section 252(b)(2) and pursuant to the Missouri Commission's procedures, to present any open issues and the parties' positions on such issues clearly and specifically, so that the Missouri Commission could then arbitrate the issues.<sup>116</sup>

35. For its part, the Missouri Commission could have exercised its authority, pursuant to section 252(b)(4)(B) and as part of its responsibility for enforcing the duty to negotiate in good faith, to require the parties to have submitted additional information, according to its procedures, that the Missouri Commission needed to facilitate the arbitration.<sup>117</sup> We wish to underscore that use of state commissions' power to request information, coupled with aggressive enforcement of the duty to negotiate in good faith, will

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<sup>112</sup> See generally MCI Petition, Affidavit of Stephen F. Morris, Exhibit B at 12-36. See *supra* ¶ 9.

<sup>113</sup> Missouri Commission Response at 3; SWBT Response at 3.

<sup>114</sup> Joint Issues Memorandum at 57-58.

<sup>115</sup> *Id.* at 58.

<sup>116</sup> Missouri Commission Response at 4; SWBT Response at 9; see also 47 U.S.C. § 252(b)(2).

<sup>117</sup> 47 U.S.C. § 252(b)(2).

increase the likelihood that arbitrations will result in completed interconnection agreements that will afford consumers a choice of service providers over the long term.

36. In any event, there is no dispute that the 41 issues clearly presented to the Missouri Commission in the Joint Issues Memorandum were decided by the Missouri Commission as set forth in the December 11, 1996 Arbitration Order. While MCI claims that the Missouri Commission "left unresolved myriad terms and conditions which are necessary to implement even those issues that it did resolve," it points to nothing in the record indicating that the "myriad terms" to which it refers were ever presented clearly and specifically to the Missouri Commission.<sup>118</sup> We recognize that the human and other resources available to state commissions to investigate and resolve open arbitration issues are finite. It would appear that, subsequent to the December 11, 1996 Arbitration Order, the Missouri Commission devoted many of its resources to establishing permanent rates for unbundled elements and services for resale, both of which were areas of significant concern for MCI.<sup>119</sup> Given that the Missouri Commission did, in fact, require the parties to submit information to supplement the August, 1996 arbitration petition<sup>120</sup> and then resolved all of the issues clearly and specifically presented to it in the Joint Issues Memorandum, we find, on these facts, that the Missouri Commission's failure to require the parties to submit even more information did not rise to the level of a "failure to act" within the meaning of section 252(e)(5). Thus, we reject MCI's argument that the Missouri Commission failed to carry out all of its arbitration responsibilities under section 252.

37. With respect to MCI's second line of argument, we reject its contention that the Missouri Commission "failed to act" because it did not resolve all disputed issues -- including those encompassed by MCI's proposed agreements -- within nine months after MCI requested interconnection with SWBT. As stated above, the language of the Act indicates that a state commission may not be found to have "failed to act" within the meaning of section 252(e)(5) solely on the basis that the state commission did not arbitrate issues that were never clearly and specifically presented to it.<sup>121</sup> Further, there is no dispute that the Missouri Commission

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<sup>118</sup> MCI Petition at 8.

<sup>119</sup> Missouri Commission Petition at 5-6; *see also* MCI Petition, Affidavit of Stephen F. Morris, Exhibit I at 2; MCI Petition, Affidavit of Stephen F. Morris, Exhibit L at 2; MCI Petition, Affidavit of Stephen F. Morris, Exhibit M at 2.

<sup>120</sup> Indeed, as SWBT and the Missouri Commission point out, the Missouri Commission's September, 1996 Consolidation Order required the parties to file an issues memorandum that "clearly set out the position of each party on every contested issue." SWBT Response at 3; Missouri Commission Response at 3.

<sup>121</sup> *See supra* ¶ 27.

resolved the issues that were, in fact, clearly and specifically presented to it in the December 11, 1996 Arbitration Order. Because the Missouri Commission issued the December 11, 1996, Arbitration Order within 9 months of March 26, 1996, the date on which MCI requested interconnection with SWBT, we conclude that the Missouri Commission met the deadline specified in section 252(b)(4)(C).<sup>122</sup>

38. As a general matter, we agree with MCI that setting deadlines for parties to an arbitration to file completed interconnection agreements will make it more likely that carriers will, in fact, reach such agreements.<sup>123</sup> It appears, for example, that the experience gained by the Missouri Commission in the course of this arbitration led it to set a deadline in its July 31, 1997 Arbitration Order for the parties to file an interconnection agreement.<sup>124</sup> We conclude, nonetheless, that the Missouri Commission's decision not to impose a deadline for the parties to file an agreement in the December 11, 1996 Arbitration Order did not, on these facts, amount to a "failure to act" within the meaning of section 252(e)(5). We find that, in light of the parties' apparent inability to agree on interconnection terms before now,<sup>125</sup> as well as the unresolved issues that the Missouri Commission did not reach (because MCI failed to present them clearly and specifically for arbitration), it would be unfair to attribute the parties' failure to reach a completed agreement at this late date primarily to the Missouri Commission's decision not to impose a deadline for the submission of such an agreement.

#### IV. CONCLUSION

39. For the foregoing reasons, we deny MCI's petition under section 252(e)(5) for preemption of the jurisdiction of the Missouri Commission with respect to MCI's arbitration proceeding with SWBT.

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<sup>122</sup> See 47 U.S.C. § 252(b)(4)(C).

<sup>123</sup> MCI Petition at 14.


<sup>124</sup> Missouri Commission Response, Attachment A at 5.

<sup>125</sup> See, e.g., December 11, 1996 Arbitration Order at 47 ("The failure of the parties to negotiate in good faith has brought the arbitration of virtually every detail to the [Missouri] Commission's doorstep.").

**V. ORDERING CLAUSES**

40. Accordingly, IT IS ORDERED that, pursuant to section 252 of the Communications Act of 1934, as amended, 47 U.S.C. § 252, the petition for preemption filed by MCI Telecommunications Corporation and MCImetro Access Transmission Services, Inc. is DENIED.

FEDERAL COMMUNICATIONS COMMISSION

  
William F. Caton  
Acting Secretary